87-996

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

THE FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Congress has granted FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, as to which the courts of appeals are in conflict?

II. If Congress did give FSLIC authority to adjudicate state law causes of action asserted against failed savings and loan associations under a FSLIC receivership, would that grant of authority violate the mandate of separation of powers in Article III, § 1 of the United States Constitution?

III. Does requiring a creditor to submit its state law claims against a failed savings and loan association under a FSLIC receivership to FSLIC for adjudication deny such creditor due process of law under the Fifth Amendment to the United States Constitution?

IV. Does requiring a creditor to submit its state law claims against a failed savings and loan association under a FSLIC receivership to FSLIC for adjudication deprive such creditor of its right to a jury trial under the Seventh Amendment to the United States Constitution?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Coit Independence Joint Venture respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported, and is reprinted in the appendix hereto, p. A-1, *infra*. The opinion ("Order") of the U.S. District Court has not been reported, and is reprinted in the appendix hereto, p. A-5, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1987. (Appendix at A-8, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

Article III, Section 1 of the United States Constitution
The Fifth Amendment to the United States Constitution
The Seventh Amendment to the United States Constitution

Statutes

12 U.S.C. § 1464(d)(6)(C)
12 U.S.C. § 1728(c)
12 U.S.C. § 1729(c)
12 U.S.C. § 1729(d)
12 U.S.C. § 1730(k)(1)

Regulations

12 C.F.R. § 549.4
12 C.F.R. § 569a.8

The text of the foregoing provisions, statutes and regulations is reprinted in the appendix hereto, p. A-21, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

From 1983 to 1986, petitioner Coit Independence Joint Venture ("Petitioner") received several loans and engaged in other dealings with FirstSouth, F.A., a federal savings association ("FirstSouth"). Petitioner and FirstSouth fell out, and

on or about October 24, 1986, Petitioner brought an action against FirstSouth in the 95th Judicial District Court of Dallas County, Texas. Petitioner alleged that FirstSouth had charged Petitioner usurious interest on loans under Texas law, and that FirstSouth had breached its fiduciary duty and its implied duty of good faith and fair dealing in connection with the loans to Petitioner. For a more complete statement of the nature of Petitioner's claims against FirstSouth, see Plaintiff's Original Petition, reprinted in the appendix hereto, p. A-9, *infra*.

B. Proceedings in the Courts Below

On or about December 4, 1986, the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") receiver for First-South pursuant to 12 U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1464(d)(6)(B)(i), on the ground, *inter alia*, that First-South's liabilities exceeded its assets. On December 31, 1986, FSLIC removed Petitioner's state court action to the United States District Court for the Northern District of Texas, pursuant to 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. § 1441. The United States District Court had original jurisdiction of this action under 12 U.S.C. § 1730(k)(1)(C) and 28 U.S.C. §§ 1331 and 1346.

On February 19, 1987, FSLIC moved the United States District Court to dismiss Petitioner's complaint, arguing that FSLIC had exclusive jurisdiction to adjudicate any and all causes of action against FirstSouth. FSLIC insisted that the federal district court had no jurisdiction to hear claims brought against FirstSouth, but that the sole recourse of a would-be litigant against an insolvent savings and loan association under a FSLIC receivership was to take its claim to FSLIC for initial adjudication, then to appeal that decision to the FHLBB, and finally to appeal the FHLBB's decision to

the federal courts pursuant to the appeal procedures dictated by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (the "APA"). The district court granted FSLIC's motion to dismiss and entered an order on February 25, 1987, dismissing Petitioner's action. (Appendix, p. A-5, *infra*). Thereafter, Petitioner filed a motion to reconsider; such motion was denied by order of the district court dated April 9, 1987. (Appendix, p. A-7, *infra*). Plaintiff appealed from these orders under 28 U.S.C. § 1291 to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the dismissal by the district court after denying Petitioner's request for an initial hearing *en banc*.

In its appeal, Petitioner argued that the Fifth Circuit's prior decision in *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985) ("Hudspeth") was erroneous in its conclusion that certain statutes and regulations governing the authority of FSLIC to act as receiver granted FSLIC exclusive jurisdiction over all claims against a failed savings and loan association. In addition, Petitioner argued that the critical statutory language upon which the Fifth Circuit had relied in *Hudspeth* had materially changed. Finally, Petitioner claimed that FSLIC's asserted jurisdiction was unconstitutional. The court of appeals summarily determined, after denying Petitioner's request for an initial hearing *en banc*, that it was bound by its prior decision in *Hudspeth*, that the change in statutory language was immaterial, and that Petitioner's constitutional claims were not ripe for resolution at this time.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues of Exceptional Importance.

This is a case of national importance. At stake is the proper judicial treatment to be given literally billions of dollars of

creditor claims against failed savings and loan associations, and the constitutional rights of those creditors.[1] To date, thousands of creditors have been deprived of any meaningful judicial redress because of the actions of FSLIC and the erroneous court of appeals decision in *Hudspeth*.

According to a recent GAO report entitled, Thrift Industry: The Treasury/Federal Home Loan Bank Board Plan for FSLIC Recapitalization (March 1987), there were, as of September 1986, some 445 thrifts nationwide operating under FSLIC's insurance guarantee that were insolvent. *See also* The Bond Buyer, March 6, 1987, at 5; Los Angeles Times, May 11, 1987, part 4, at 2, col. 3. Furthermore, FSLIC has stated in its petition for rehearing in *Morrison-Knudsen Co. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987) ("*Morrison-Knudsen*") (currently Petition for Writ of Certiorari, No. 87-451) that "in those states within the Ninth Circuit alone, there currently are 36 Bank Board appointed FSLIC receiverships" and "in those 36 receiverships 1,385 creditor claims aggregating $6,990,551,251 are either pending or resolved." (Federal Savings and Loan Insurance Corporation's Petition for Rehearing and Suggestion of Appropriateness of

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[1] There are currently two other petitions for writs of certiorari before this Court on similar issues: *Magd E. Zohdi, Quality Contracting and Services, Inc., et al. v. FSLIC as Receiver of Sun Belt Federal Bank, F.S.B.*, No. 87-255, filed August 5, 1987, and *FSLIC as Receiver for Westside Federal Savings and Loan Association v. Stevenson Associates, et al.*, No. 87-451, filed September 17, 1987. The Solicitor General has acquiesced in the petition for a writ of certiorari in *Zohdi*, No. 87-255, but this petition raises several issues, including constitutional issues of due process and right to trial by jury, which are not raised by the two other petitions. Accordingly, this petition should be included in any grant of certiorari on the issue of the scope of FSLIC's adjudicatory power as receiver.

Rehearing En Banc, p. 3.) FSLIC also states in its petition for rehearing in *Morrison-Knudsen* that "it is inevitable that the number of receiverships and creditor claims will increase." *Id.* Accordingly, there are approximately 38 creditors for each thrift institution in receivership within the Ninth Circuit alone.

While Petitioner does not know the number of thrifts actually in receivership nationwide, it is obvious that with 445 thrifts in an insolvent condition as of September 1986, the rights of thousands of creditors are or potentially will be affected by any decision that forces creditor claims to be decided administratively rather than by the courts. Furthermore, if the Fifth Circuit's position as expressed in this case is incorrect, then adjudication of creditor claims in administrative hearings before FSLIC and the FHLBB will be a waste of FSLIC's administrative resources because creditors will, in the absence of a definitive ruling from this Court, continue to challenge FSLIC's jurisdiction to hear creditor claims and such claims may have to be reheard in the courts. This is not due to any hostility to administrative proceedings, as such, but to a deeply held conviction that FSLIC is not and cannot be impartial, to the belief that Congress never granted FSLIC adjudicatory authority over creditor claims, and to the conviction that it is unconstitutional to delegate the trial of private state law claims to a federal administrative tribunal. The potential waste of judicial and administrative resources that will result from any delay in resolving the issue of the scope of FSLIC's adjudicatory power is thus very substantial. The issues presented by this petition therefore go well beyond the rights of the parties to this case, and affect the administrative/judicial process and the constitutional rights of many other similarly situated persons nationwide.

II. The Fifth Circuit's Determination that Congress Has Granted FSLIC, as Receiver, the Exclusive Authority to Adjudicate the Validity of State Law Claims Against Failed Savings and Loan Associations under a FSLIC Receivership is in Direct Conflict with a Decision of the Ninth Circuit Court of Appeals.

The Fifth Circuit, in affirming the dismissal by the district court of Petitioner's state law claims against FirstSouth for lack of subject matter jurisdiction, stated that it was bound by its prior decision in *Hudspeth*. In *Hudspeth*, the Fifth Circuit interpreted federal statutes and regulations as granting FSLIC the exclusive power to adjudicate all causes of action by creditors against failed savings and loan associations under a FSLIC receivership, subject only to judicial review under a deferential standard of the APA.[2] This interpretation was expressly rejected by the Ninth Circuit in *Morrison-Knudsen*. Both courts have acknowledged the direct conflict. *Morrison-Knudsen*, 811 F.2d at 1212; Appendix at A-2.

A. Section 1464(d)(6)(C)

The first of the two statutes relied upon by the Fifth Circuit in *Hudspeth* was 12 U.S.C. § 1464(d)(6)(C), which provides in relevant part:

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[2] What standard of review under the APA would apply appears to be unsettled. *Compare, Morrison-Knudsen*, 811 F.2d at 1222 (arbitrary and capricious standard) *with Lyons Savings & Loan Association v. Westside Bancorporation, Inc.*, 636 F. Supp. 576, 580 (N.D. Ill. 1986) (weight of the evidence standard); *see* Appendix at A-4, n.3.

> Except as otherwise provided in this subsection, no court may . . . except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver.

The Fifth Circuit opined that judicial adjudication of "even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets" because "FSLIC would not be able to determine how much to pay other claimants until the termination of parallel litigation." *Hudspeth*, 756 F.2d at 1102. Thus, the court decided, judicial adjudication would "restrain or affect" FSLIC's receivership function in violation of this provision.[3]

The Ninth Circuit rejected the Fifth Circuit's construction of Section 1464(d)(6)(C). First, the Fifth Circuit's conclusion that judicial resolution of even the facial merits of claims would delay, and thus "restrain or affect," FSLIC's receivership functions in contravention of Section 1464(d)(6)(C), was rejected because it failed to explain how judicial review

[3] Petitioner argued in its appeal to the Fifth Circuit that Section 1464(d)(6)(C) was a species of *anti-injunction statute* designed to prevent interference with the functions of a receiver by means of *coercive judicial decrees*. It was *not* designed to prevent judicial resolution of *damage* actions. The Fifth Circuit was in error in assuming that judicial adjudication would delay the liquidation of assets and thus "restrain or affect" FSLIC's receivership functions in violation of Section 1464(d)(6)(C). To the contrary, judicial adjudication would in no way hinder such liquidation: FSLIC would be free to proceed with distribution of assets, but would remain liable to any creditors whose claims were wrongly denied, as does the FDIC. *See, First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978); Note, *Creditors' Remedies Against the FDIC as Receiver of a Failed National Bank*, 64 Tex. L. Rev. 1429, 1438 (1986).

under the APA, which the Fifth Circuit would allow, would *not* cause such restraint or effect. *Morrison-Knudsen*, 811 F.2d at 1216. Moreover, the Ninth Circuit pointed out that Section 1464(d)(6)(C) is not an affirmative grant of power, but only a negative prohibition, and thus cannot provide a basis for FSLIC's claim of adjudicatory authority. *Morrison-Knudsen*, 811 F.2d at 1217. Furthermore, the court stated that ordinarily the functions of a receiver do not include adjudication. The Ninth Circuit concluded that judicial adjudication does not restrain or affect a receivership, but "simply determines the existence and amount of claims that a receiver is to honor in its eventual distribution of assets." *Id.*

B. Section 1729(d)

The Fifth Circuit also relied upon 12 U.S.C. § 1729(d), which provides in relevant part:

> In connection with the liquidation of insured institutions, [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board . . . .

Based upon the grant of power in Section 1729(d) to FSLIC to "settle, compromise, or release claims" against the insolvent thrift and to "do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board," the Fifth Circuit concluded that Congress had intended to totally divest the courts of the power to adjudicate, in the first

instance, creditor claims against failed thrifts under a FSLIC receivership.[4]

The Ninth Circuit also rejected the Fifth Circuit's interpretation of Section 1729(d). Rather than implying Congressional intent to grant FSLIC extraordinary adjudicatory powers, the Ninth Circuit noted that the power to "compromise, settle, or release" claims is actually incompatible with the power to adjudicate: settlement and compromise "strongly suggest the presence of the power of the other party to take the dispute to court." *Morrison-Knudsen*, 811 F.2d at 1219.[5]

C. Board Regulations

The Fifth Circuit's conclusion in *Hudspeth* was "fortified by the existence of FHLBB regulations setting forth procedures for FSLIC payment of creditor claims," by which FSLIC, after giving notice, is authorized to disallow claims "not proven to its satisfaction." *Hudspeth*, 756 F.2d at 1102-03, citing 12 C.F.R. §§ 569a.8 and 549.4.

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[4] The critical language of § 1729(d) had significantly changed prior to the time Petitioner filed suit, and prior to the time that FirstSouth was placed in receivership. The Fifth Circuit incorrectly disregarded this material change, as more fully described in Part III, *infra*.

[5] Petitioner also argued that the Fifth Circuit's construction of Section 1729(d) was inconsistent with its own statutory interpretation. The language of Section 1729(d), that FSLIC has power to settle, compromise, or release claims "subject only to the regulation of the [FHLBB]," under the Fifth Circuit's literal interpretation, would preclude not only *initial* adjudication by the courts, but judicial review by the courts of FSLIC's determination as well. Yet, the Fifth Circuit would allow judicial review under the APA, thus contradicting its own position.

The Ninth Circuit was not persuaded by such FHLBB regulations. While 12 C.F.R. §§ 569a.8 and 549.4 permit FSLIC to pay or refuse to pay a particular claim, the Ninth Circuit found that they do not empower FSLIC to adjudicate the merits of those claims, but only to determine "*whether a dispute exists*. It does not empower FSLIC to *resolve the dispute with the force of law*." *Morrison-Knudsen*, 811 F.2d at 1218 (emphasis in original). Rather, the court found FSLIC's authority under the FHLBB regulations to be analogous to that of an insurance company, which may disallow claims not proven to its satisfaction, but its decision may thereafter be challenged in court. *Id.*[6]

D. Other Provisions Contradicting the Fifth Circuit Position

The Ninth Circuit also focused upon other provisions directly contradicting the Fifth Circuit's conclusions in *Hudspeth*. First, the court noted that, when Congress intended FSLIC to act as adjudicator of federal law violations, the agency procedures for such adjudication were carefully delineated in the statutes and regulations. *Morrison-Knudsen*, 811 F.2d at 1219-20. No such analogous delineations were enacted regarding FSLIC's handling of creditors' claims. The Ninth Circuit found the inference "irresistible" that "had Congress any intention of permitting FSLIC to adjudicate in

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[6] Petitioner also challenged the Fifth Circuit's interpretation of FHLBB regulations, which grant FSLIC authority to approve claims "proved to its satisfaction" and to disallow claims "not so proved" on the grounds that the regulations did not contain an appropriate standard for the adjudication of the merits of a claim. Such regulations cannot imply the power to adjudicate because the requirement that claims be proven to FSLIC's "satisfaction" is entirely subjective, and as such is contrary to the objective standards associated with an impartial adjudication.

its capacity as receiver, similar provisions . . . would have been enacted." *Id.* at 1220.

Second, the Ninth Circuit was persuaded by 12 U.S.C. § 1728(c), a statute of limitation regarding depositors' claims against FSLIC. While the court recognized that this statute technically applies only to depositors' claims, it clearly anticipates judicial adjudication in the event of a disputed claim: the logical inference being that FSLIC may adjudicate neither depositors' nor creditors' claims. *Morrison-Knudsen*, 811 F.2d at 1220. "To assume that FSLIC must litigate *depositors*' claims, with which it has great expertise, but may adjudicate *creditors*' claims . . . as to which its expertise is much less, is not a rational interpretation of the statutory scheme." *Id.*

The Ninth Circuit found further support for its position in 12 U.S.C. § 1730(k)(1). That statute expressly includes, within the suits against state-chartered institutions which FSLIC must defend against in state courts, an action against FSLIC "in its capacity as . . . receiver . . . which involves only the rights . . . of . . . creditors." *Id.* After noting that there was no indication that Congress intended to treat state-chartered and federally-chartered institutions differently in this regard, the Ninth Circuit concluded that "Congress clearly expected creditors' suits against FSLIC as receiver to be heard and adjudicated in court." *Morrison-Knudsen*, 811 F.2d at 1221. The court found further support for its conclusion in the fact that the FDIC, although granted analogous powers by Congress, had never asserted, in its long history of litigating creditor claims, the exclusive power to adjudicate those claims. *Id.*

Finally, in dicta, the Ninth Circuit noted the "serious constitutional difficulties that attend FSLIC's assertion of adjudicatory jurisdiction" under Article III, Section 1 of the

U.S. Constitution and *Northern Pipeline Construction Co.v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as private causes of action would thus be adjudicated by a non-Article III agency. The court decided that it was unnecessary to pass on these matters, as it "reject(ed) FSLIC's interpretation because it raises these 'serious' constitutional difficulties, which the statute can quite 'fairly be read' to avoid." *Morrison-Knudsen*, 811 F.2d at 1222, citing *Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3252 (1986).

A review of *Hudspeth* and *Morrison-Knudsen* indicates that a direct and irreconcilable conflict exists between the Fifth and the Ninth Circuits on the same matter of federal law.

III. The Fifth Circuit Incorrectly Decided Petitioner's Appeal.

A. Statutory Arguments

The Fifth Circuit never addressed the merits of Petitioner's arguments against its statutory interpretation. Instead, the court simply declared itself bound by *Hudspeth* after denying Petitioner's request for an initial hearing *en banc*.

Furthermore, the court incorrectly dismissed Petitioner's point that the critical language of Section 1729(d) had materially changed prior to Petitioner's suit, and prior to First-South being placed in receivership. The statute in *Hudspeth* read: "[FSLIC] shall have power . . . to settle, compromise, or release claims . . . against the insured institutions, and to do all other things that may be necessary in connection therewith, *subject only to the regulation of the [FHLBB]*." (Emphasis added). On October 13, 1986, the language changed to read: "subject only to the regulation of the *court* or other public authority having jurisdiction over the matter." (Emphasis added). The Fifth Circuit disregarded this change as

immaterial based upon 12 U.S.C. § 1729(c)(3)(B), which states:

> In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) of this section shall mean said [Federal Home Loan Bank] Board.

The court's reliance upon this section was misplaced because the reference therein to "any such institution" is expressly limited by 12 U.S.C. § 1729(c)(1) to institutions "*other than a federal* savings and loan association . . ." (Emphasis added). Accordingly, Section 1729(c)(3)(B) has no application to Petitioner's claims in this case, because First-South is a *federally* chartered savings association. Thus, contrary to the Fifth Circuit's assertion, there has been a material change in the statutory scheme since *Hudspeth* was decided.

B. Ripeness

Petitioner argued that the Fifth Circuit's interpretation of FSLIC's statutory authority to adjudicate creditor claims would render the applicable statutes unconstitutional. Petitioner argued that the grant of exclusive authority to FSLIC to adjudicate Petitioner's state law claims would violate the doctrine of separation of powers required by Article III, Section 1 of the Constitution, Petitioner's Fifth Amendment right to due process, and Petitioner's Seventh Amendment right to a trial by jury. These points were also avoided by the Fifth Circuit, which found Petitioner's constitutional claims "not ripe for resolution at this time. The FSLIC may allow all or more of (Petitioner's) claims, depriving Petitioner of standing and a grievance." (Appendix at A-4.)

This determination was incorrect for three reasons. First, Petitioner's constitutional claims directly challenge the constitutional legitimacy of subjecting Petitioner to any administrative adjudication by FSLIC. Under such circumstances, the ripeness doctrine does not apply. As this Court stated in *Public Utilities Commission v. United States*, 355 U.S. 534, 539-40 (1958):

> If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

Thus, because the determination of a challenge to the constitutionality of statutes is peculiarly within the province of the courts, Petitioner has an immediate right to have that issue determined before it is subjected to an unconstitutional administrative procedure.

Second, Petitioner demonstrated that imminent harm would be caused by subjecting its claims to FSLIC's asserted jurisdiction. The presumption that FSLIC might grant Petitioner its requested relief was belied by the fact that FSLIC had already stated its position in its brief in the Fifth Circuit that Petitioner's claims are barred under the "*D'Oench, Duhme* doctrine" because the proof of such claims was not memorialized in Respondent's books and records. See Appellee's Brief in the Fifth Circuit at 37-38. Furthermore, during the pendency of this case in the Fifth Circuit, FSLIC posted

Petitioner's property for foreclosure, to Petitioner's injury. (Appendix at A-18.)[7]

Finally, another panel of the Fifth Circuit held only three weeks after the decision in this case that it *would* review a constitutional challenge to FSLIC's assertion of exclusive jurisdiction over creditor claims in light of this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) and the Ninth Circuit's decision in *Morrison-Knudsen. See Thomes v. Equitable Savings and Loan Association*, 831 F.2d 558 (5th Cir. 1987). The panel's decision in the *Thomes* case is directly contrary to the panel's decision in the instant case on the ripeness issue.

Thus, Petitioner's constitutional claims were and are ripe for decision, and the Fifth Circuit's methodical sidestepping of Petitioner's arguments on appeal was unjustified. Those constitutional claims were and are as follows.

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[7] The Fifth Circuit's reliance in the instant case upon *Poe v. Ullman*, 367 U.S. 497 (1961) was misplaced. In *Poe*, this Court denied the plaintiffs' request for a declaratory judgment that a Connecticut law prohibiting the use of contraceptives was unconstitutional, because the plaintiffs could not show the requisite likelihood of immediate harm. The statute which the plaintiffs sought to challenge had been on Connecticut's books since 1879, and had been applied only once in over 80 years in a test case to determine the statute's constitutionality. Furthermore, this Court noted that contraceptives were openly sold in drugstores throughout Connecticut, without prosecution. *Id.* at 1755. The unlikelihood of the *Poe* plaintiffs' injury was absolutely clear, and no meaningful analogy can be found between the facts of that case and this one.

C. Constitutional Arguments

1. *Separation of Powers*

The Fifth Circuit's position, that FSLIC has exclusive jurisdiction to adjudicate Petitioner's claims against FirstSouth, violates the doctrine of separation of powers required by Article III, Section 1 of the Constitution, (hereinafter "Article III"). This problem was recognized by the Ninth Circuit in *Morrison-Knudsen*, and provided the basis of Justice Akin's decision in *Glen Ridge I Condominiums, Ltd. v. FSLIC*, No. 05-85-00873-CV (Tex. App. — Dallas, December 30, 1986), in which the Fifth Circuit's position was rejected.

Adjudicatory power, normally vested in Article III courts, may only be delegated to non-Article III tribunals in narrowly-circumscribed areas. *In Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court found unconstitutional a grant of broad and exclusive adjudicatory power to bankruptcy judges, analogous to the power claimed by FSLIC in this case. This Court held that the attempted delegation of power to non-Article III courts, to adjudicate private rights, i.e., common law and statutory claims arising between private litigants, violated Article III. *Id.* at 68-70. *Compare Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) (delegation to non-Article III tribunal of power to adjudicate public rights, i.e. those created by Congress, held not unconstitutional) *and Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986) (delegation to non-Article III tribunal of jurisdiction over narrow class of claims, concurrent with that of district courts, and with claimants' consent, held not unconstitutional).

Here, the Fifth Circuit has upheld what it has interpreted to be a grant of *exclusive* power to adjudicate a limitless class of claims, which include common law claims arising between

private litigants. If the Fifth Circuit has correctly construed Congressional intent in this context, such an intended grant of adjudicatory power is clearly violative of *Marathon* and Article III.

2. *Due Process*

The due process clause of the Fifth Amendment to the U.S. Constitution entitles parties in criminal and civil cases to an impartial and disinterested tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Fifth Circuit's position, which would require Petitioner to submit its claims to FSLIC for adjudication, would violate due process, because FSLIC is not an impartial and disinterested tribunal.

This Court has held that it denies due process to require a litigant to have his rights adjudicated by an official who "perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (mayor of city could not be regarded as impartial judge where he or city received pecuniary benefit from fines, forfeitures, or other fees imposed by him in his position as judge).

As the adjudicator of Petitioner's claims against FirstSouth, FSLIC would likewise occupy "two practically and seriously inconsistent positions." *Ward*, 409 U.S. at 60. As liquidating receiver for FirstSouth's assets, FSLIC must promptly reimburse FirstSouth's depositors from FSLIC's insurance fund, and then satisfy the claims of FirstSouth's nondepositor creditors to the extent that FirstSouth's assets allow. FSLIC thus "becomes both the holder of the claimed assets and, because subrogated to the reimbursed depositors' rights, the *single largest claimant against such assets.*" *Morrison-Knudsen*, 811 F.2d at 1215-16 (emphasis added). It is formulaic that

FSLIC's insurance fund, which is "currently under an unprecedented strain," *id.*, at 1216, can best be maintained if fewer third-party claims against the receivership estate are successful. Furthermore, the Fifth Circuit's ruling that Petitioner would suffer no harm by presenting its claims initially to FSLIC ignores the fact that FSLIC, in its capacity as receiver for FirstSouth, threatened Petitioner with foreclosure and thereafter posted Petitioner's properties for sale while Petitioner's case was pending in the Fifth Circuit. (*See* Appendix at A-18). Petitioner is denied due process when it is forced to present its claims to an administrative tribunal that is acting as both adversary and judge at one and the same time.

Because FSLIC's enabling legislation, as construed by the Fifth Circuit, requires Petitioner to submit its claims against FirstSouth to a tribunal so clearly interested in denying or minimizing Petitioner's recovery, that legislation violates Petitioner's due process rights.[8]

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[8] The Fifth Circuit's reliance on *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1411 (5th Cir. 1987) in connection with Petitioner's due process argument is wholly misplaced. In *Woods*, a savings and loan association attacked the FHLBB's appointment of FSLIC as a receiver over its assets without a post-deprivation evidentiary hearing. *Woods* involved the sufficiency of the hearing procedures adopted by Congress for the appointment of a receiver over a regulated entity and had nothing to do with a challenge to the impartiality of FSLIC in its capacity as an adjudicator of private claims. Thus, the issue involved in this case of whether FSLIC is sufficiently impartial to act in an adjudicatory capacity to decide claims filed against savings and loan associations by unregulated third-party claimants was in no way involved in the *Woods* case.

3. *Right to Trial by Jury*

The Fifth Circuit's position also violates Petitioner's right to a trial by jury as guaranteed by the Seventh Amendment to the U.S. Constitution. This Court has held that the Seventh Amendment applies to claims for damages (like Petitioner's herein) which are based upon statutes and the common law. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

Although this Court has created limited exceptions to the right to jury trial, those exceptions do not apply here. One exception is for claims involving "public rights," defined as rights "arising between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," generally including such areas as taxation, commerce, and immigration. *Marathon*, 458 U.S. at 67-68, 70. The right to jury trial remains inviolate, however, as to "[w]holly private tort, contract, and property cases" such as Petitioner's claims. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977).

Another exception is for actions "against the United States." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). In determining whether a lawsuit is against the United States, this Court has held that substance, not form, controls: "The identity of the named parties defendant is not controlling; the dispositive inquiry is, 'who will pay the judgment?' " *Stafford v. Briggs*, 444 U.S. 527, 542 and n. 10 (1980). The "most availing inquiry" in determining whether a suit has been brought against the United States is whether "the judgment sought would expend itself on the public treasury or domain. . . . Where recovery can be had from funds in the possession and control of the agency and not from the United States Treasury, the United States is not involved in the suit." *FSLIC v. Williams*, 599 F. Supp. 1184, 1203 (D. Md. 1984).

Any argument that Petitioner in this lawsuit has brought an action "against the government" ignores the substance and glorifies the mere form of the suit. Petitioner brought this suit not against FSLIC for any wrongful act committed by FSLIC in its capacity as insurer or receiver, but against FirstSouth. Petitioner here asserts legal rights based on a dispute between Petitioner and FirstSouth, a private entity, which rights vested *independently of and prior to* FSLIC's assumption of receivership power over FirstSouth. Petitioner faces FSLIC as a defendant solely because FSLIC substituted itself in the lawsuit in place of FirstSouth. Unlike suits "against the government," this suit will not result in any recovery from funds of the United States Treasury. Until such time as the receivership assets of FirstSouth are distributed, Petitioner will recover, if at all, from those receivership assets. Even after FirstSouth's assets are distributed, however, a judgment may be awarded against the insurance funds in FSLIC's possession and control without affecting funds in the public treasury. *FSLIC v. Williams*, 599 F. Supp. at 1203-04. Because Petitioner's suit is not against the government, Petitioner is entitled to a jury trial.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1987

APPENDIX

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff-Appellant,

v.

FIRSTSOUTH, F.A.,

Defendant-Appellee.

No. 87-1218

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 16, 1987.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Coit Independence Joint Venture appeals the dismissal, for lack of subject matter jurisdiction, of a suit against a savings and loan association in federal receivership. We affirm.

I. BACKGROUND

From 1983 to 1986, the Coit Independence Joint Venture received several loans and engaged in other dealings with FirstSouth, a federal savings association. Coit and FirstSouth fell out, and Coit sued FirstSouth in Texas court in October 1986, for usury, breach of fiduciary duty, and breach of the duty of good faith and fair dealing. In December 1986, the Federal Home Loan Bank Board (FHLBB) declared FirstSouth insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver. The FSLIC removed the case to federal court. In February 1987, the

district court dismissed the suit for lack of subject matter jurisdiction. The district court held that, under federal banking statutes, suits by creditors against the FSLIC as receiver must be presented first to the FSLIC, then appealed to the FHLBB, and only then appealed to the federal courts under the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq.* Coit appeals this dismissal.

II. DISCUSSION

Coit argues, first, that Congress did not intend the FSLIC to enjoy exclusive jurisdiction over creditors' state-law claims against savings associations under FSLIC receivership. Two courts have accepted Coit's statutory interpretation. *Glen Ridge Condominiums, Ltd. v. Federal Savings and Loan Insurance Corp.*, 734 S.W.2d 374 (Tex.App. — Dallas, 1986); *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987). However, as Coit acknowledges, this Court has held that the statutes do give the FSLIC exclusive jurisdiction over suits brought by creditors against receiverships. *Northern Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986) (interpreting 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d)). We have reaffirmed the *Hudspeth* decision several times, and are clearly bound by it.[1] *Federal Savings and Loan Insurance Corp. v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987); *Goodwin v. Federal Savings and Loan Insurance Corp.*, 806 F.2d 1290, 1292 (5th Cir. 1987); *Chupik Corp. v. Federal Savings and Loan Insurance Corp.*, 790 F.2d 1269 (5th Cir. 1986).

[1] Coit, recognizing that *Hudspeth* controls and that one panel may not overrule another panel, has petitioned for initial en banc hearing of this case. No member of this Court has indicated support for this motion, and it has been denied.

Coit points out that one of the statutory provisions relied on in *Hudspeth* has since been changed. The statute in *Hudspeth* read: "[T]he [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of *the Federal Home Loan Bank Board* . . . ." 12 U.S.C. § 1729(d) (emphasis added), cited in *Hudspeth*, 756 F.2d at 1101. On October 13, 1986, the language changed to read: ". . . subject only to the regulation of *the court or other public authority having jurisdiction over the matter.*" *Id.* (emphasis added). However, this Court has subsequently reaffirmed the FSLIC's exclusive jurisdiction. *Bonfanti*, at 1393. Moreover, the statute itself says:

> In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) of this section shall mean said [Federal Home Loan Bank] Board.

12 U.S.C. § 1729(c)(3)(B).[2] Hence, the change in statutory language will not support overruling *Hudspeth*.

Coit argues that the statute, when interpreted to grant the FSLIC exclusive jurisdiction, violates the Constitution in several ways. First, Coit contends that its suit, as a common-law suit arising between private parties, must be heard by an article III court. Second, Coit claims that sending the dispute to an administrative body violates due process in that the FSLIC will act as both party and judge and in that any administrative determination will be reviewed under the

[2] This language was deleted in 1982 and reinstated effective October 13, 1986. 12 U.S.C.A. § 1729 (West 1987 Supp.).

lenient "substantial evidence" standard.[3] Third, Coit argues that administrative adjudication would deprive it of the right to trial by jury.

This Court has recently held that administrative review of FSLIC receivership actions affords due process. *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1411 (5th Cir. 1987). Coit's other constitutional arguments have not been directly addressed by our cases. However, the arguments are not ripe for resolution at this time. The FSLIC may allow all or more of Coit's claims, depriving Coit of standing and a grievance. The Supreme Court has held that a party seeking to overturn legislation as unconstitutional must be "immediately harmed, or immediately threatened with harm" by the application of the statute. *Poe v. Ullman*, 367 U.S. 497, 505, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989 (1961). Coit does not meet this test.

In sum, Coit's statutory arguments are foreclosed by binding precedents of this Court. Coit's constitutional arguments, to the extent that they were not implicitly resolved by the precedents, are not yet ripe for resolution. Accordingly, the district court's dismissal is AFFIRMED.

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[3] Interestingly, the FSLIC states in its brief, "FSLIC has no authority to issue binding orders or final judgment against Coit." Appellee's Brief at 41 n. 8. The effect of a FSLIC/FHLBB determination and the standard of review to which such determinations will be subject are apparently unsettled. *Compare Lyons Savings and Loan Ass'n v. Westside Bancorporation, Inc.*, 636 F.Supp. 576, 580 (N.D.Ill.1986) (quoting legislative history indicating that Congress assumed that the courts would review FSLIC decisions using the more stringent "weight of the evidence" standard) *with Morrison-Knudsen Co.*, 811 F.2d at 1222 (absent explicit congressional direction, appellants would be reduced to seeking reversal under the "arbitrary and capricious" standard).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,

Plaintiff,

v.

FIRSTSOUTH, F.A.,

Defendant.

CA 3-86-3185-R

ORDER

In *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 106 S.Ct. 790 (1986), the Fifth Circuit held that the FSLIC has the exclusive power to determine *all* claims — including those raised in litigation — against the FSLIC, as receiver for a savings and loan association. This Court, as it must, followed *Hudspeth* in *Glen Ridge I Condominiums v. FSLIC*, CA 3-85-1709-R (N.D. Tex. Sept. 27, 1985), and Judge Fish did the same in *Zervas v. Falkner*, CA 3-84-0238-G (N.D. Tex. Sept. 30, 1985).

The FSLIC has been appointed as receiver for Firstsouth. Accordingly, the Motion of the FSLIC to Dismiss the Plaintiff's Complaint is GRANTED.[1]

---

[1] This order is being entered *before* the expiration of the twenty (20) day period for the plaintiff's response — in an attempt to save expense and attorneys fees for the plaintiff in filing a needless response — since any attempt to obtain a reversal of *Hudspeth* must be addressed to the Fifth Circuit. However, if the plaitniff [sic] does wish to file a reply to the motion to dismiss, the reply will be treated as a motion for reconsideration of this Order.

SIGNED this 25th ay of February, 1987.

s/JERRY BUCHMEYER
United States District Judge
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

COIT INDEPENDENCE JOINT VENTURE,
Plaintiff,
v.
FIRSTSOUTH, F.A.,
Defendant.
} CA 3-86-3185-R

ORDER

Plaintiff Coit Independence Joint Venture moves this Court to Reconsider and Vacate Its Order of February 25, 1987 dismissing this action, and to Remand this action to state court. Upon consideration of the Motions, the Responses thereto, and all relevant authority, this Court is of the opinion that both of Plaintiff's Motions should be denied; it is therefore

ORDERED that Plaintiff's Motion to Reconsider and Vacate and its Motion to Remand shall be and hereby are DENIED, and it is further

ORDERED that the Court's Order of February 25, 1987 dismissing this action shall not be disturbed.

Signed this 9th day of April, 1987.

/s/JERRY BUCHMEYER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1218
Summary Calendar

D.C. Docket No. CA-3-86-3185-R

COIT INDEPENDENCE JOINT VENTURE,
Plaintiff-Appellant,

versus

FIRSTSOUTH, F.A.,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before POLITZ, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1987

ISSUED AS MANDATE: Nov. 9, 1987

OP-JDT-10C
Rev. 4/85

NO. 86-14274

COIT INDEPENDENCE JOINT VENTURE, *Plaintiff,* vs. FIRSTSOUTH, F.A., *Defendant.*	In the District Court of Dallas County, Texas 95th Judicial District

PLAINTIFF'S ORIGINAL PETITION

Coit Independence Joint Venture, Plaintiff, files this its Original Petition complaining of FirstSouth, F.A. ("FirstSouth"), Defendant, and as grounds therefor would show the following:

PARTIES

1. Plaintiff is a joint venture organized and existing in accordance with the laws of the State of Texas with its place of business in Dallas County, Texas.

2. Defendant FirstSouth is a federal association organized and existing under the laws of the United States. The principal place of business of FirstSouth is in Pine Bluff, Arkansas. FirstSouth has done business and is doing business in the State of Texas by entering into contracts with Texas residents which are performable in whole or in part in the State of Texas. FirstSouth has not designated an agent upon whom service may be made and therefore may be served by serving the Secretary of State of Texas to be forwarded to the President of FirstSouth, William Bruton, at the address of FirstSouth's principal place of business at Post Office Box 900, Pine Bluff, Arkansas 71611.

BACKGROUND

3. In May of 1983, Plaintiff was assigned the right to purchase from the trustees of E Systems, Inc. Pool Trust, approximately 1,000 acres of land (the "Rasor tract") for approximately $20 million. The closing of the purchase of the Rasor tract was scheduled for June 1, 1983. During April and May of 1983, various entities approached representatives of Plaintiff inquiring about purchasing the Rasor tract from Plaintiff after the June 1, 1983 closing. After various meetings and discussions, an oral agreement in principle to sell the property was reached between Plaintiff and Sterling-Coit, Ltd. The agreement in principle was reduced to a written contract of sale and signed on May 26, 1983 between Plaintiff and Sterling-Coit to sell the Rasor tract at a profit of approximately $10 million. That sale was scheduled to close within seventy-five days of the date of the contract and did in fact close on August 12, 1983 when the Rasor tract was sold at a profit of approximately $10 million.

4. During March and April of 1983, Plaintiff was also seeking financing to purchase the Rasor tract for the scheduled closing of June 1, 1983. Plaintiff spoke with various lenders, and in early April of 1983, Plaintiff was put in touch with Defendant FirstSouth and one of its officers, Joel Cheatham. In seeking financing for the property, Plaintiff's representatives advised FirstSouth that there was little or no risk in loaning the money to purchase the property for the reason that Plaintiff had verbal commitments from a potential purchaser to buy the property at an approximate $10 million profit. Defendant FirstSouth, upon learning that Plaintiff would be selling the property for an approximate $10 million profit in a very short period of time, advised Plaintiff that it would be willing to loan to Plaintiff up to an aggregate amount of $31 million if Plaintiff agreed to pay to Defendant

not only the calculated interest rate at the treasury bill rate plus 4.25% but, as additional compensation for the use of the funds, a 25% "profit participation" interest and a "loan origination fee" or "commitment fee" in the approximate amount of $310,000, approximately $100,000 of which was refunded upon funding of the loan. The basic agreement between the parties is evidenced by the April 13, 1983 commitment letter, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

5. Thereafter, on June 1, 1983, Defendant loaned to Plaintiff the approximate amount of $20 million under the terms of the Promissory Note and Loan Agreement, true and correct copies of which are attached hereto as Exhibits "B" and "C" respectively and incorporated herein by reference. Before the funding of the loan on June 1, 1983, Plaintiff advised FirstSouth that it had executed a written contract to sell the Rasor tract to Sterling-Coit for an approximate $10 million profit with such closing to take place on or before August 12, 1983. Accordingly, before FirstSouth actually loaned the money to Plaintiff on June 1, 1983, it knew that Plaintiff already had a contract to sell the property at a substantial profit within a short period of time. As evidence of such knowledge is the letter dated May 31, 1983, a true and correct copy of which is attached hereto as Exhibit "D" and incorporated herein by reference, wherein Defendant agreed to credit or refund a portion of the "commitment fee" if Plaintiff sold the property within 90 days, as it was apparent to the parties that such sale would take place.

6. On August 12, 1983, the sale of the property to Sterling-Coit took place and the note in the approximate amount of $20 million payable to Defendant FirstSouth was paid back by Plaintiff. Thus, Defendant loaned to Plaintiff approximately $20 million on June 1, 1983 and was paid back

approximately $23 million on August 12, 1983 for the use of the $20 million for a period of roughly 72 days. The $23 million figure is arrived at by adding to the $20 million loan approximately $500,000 in interest paid back plus $2.216 million in "profit." Plaintiff would further show that the "commitment fees" and "loan origination fees" and other fees charged and received by FirstSouth were not bona fide commitment fees and were not reasonably related to the value of any service performed by Defendant FirstSouth in the making of the loan since no service was performed. Such fees were in fact compensation for the loaning of money and should be deemed interest in the transaction. Accordingly, the principal amount of the loan should be reduced by the amount of loan commitment fees and loan origination fees used in the transaction for the purpose of making usury calculations.

7. On August 12, 1983, the same day as the closing of the sale by Plaintiff to Sterling-Coit of the Rasor tract, Plaintiff purchased approximately 91 acres of land located at Coit and Frankford Road in far North Dallas (the "Frankford property"). Defendant FirstSouth agreed to loan to Plaintiff in the aggregate $30 million to purchase and develop the Frankford property.

8. Under the loan agreement regarding the Frankford property, a true and correct copy of which is attached hereto as Exhibit "E" and incorporated herein by reference, Defendant FirstSouth also contracted to receive, in addition to interest, a twenty-five percent (25%) profit participation interest in the cash flow and net gain on the property. The appraised value of the Frankford property at the time the Frankford loan was closed was approximately $39 million. Additionally, FirstSouth charged and received various fees at the closing of the loan on the Frankford property which were

not bona fide commitment fees or other fees for any services rendered by FirstSouth so that such fees are to be deemed interest and have the effect of reducing the principal amount of the loan to Plaintiff to a lower true principal amount for the purpose of usury calculations.

9. In making the loan to purchase the Frankford property Defendant FirstSouth represented that it would loan additional monies for the development of the property and that it would carry the loan, by executing any necessary renewal notes, for at least five years unless the property was sold prior to that time. When the Frankford note matured on August 12, 1984, Defendant FirstSouth agreed to extend the maturity date to August 12, 1985, and then subsequently to August 12, 1986. However, in addition to the interest being charged by Defendant FirstSouth, Defendant FirstSouth charged "extension fees" in the amount of $450,000 for each extension of the maturity date of the note. Additionally, Defendant FirstSouth required Plaintiff to execute promissory notes in the amount of $3,000,000 and in the amount of $4.6 million dollars and charged other fees in addition to the extension fees, all of which fees are in fact interest which render the loan transactions usurious.

10. Defendant FirstSouth further represented to Plaintiff that under the terms of the loan agreements it would allow Plaintiff to draw down funds to make improvements to the property and would loan Plaintiff additional funds to carry the interest on the notes and would renew the notes until such time as the property could be sold. From December 1984 to August 1985, Plaintiff drew down approximately $3,000,000 to make improvements to the property, including construction of roads and thoroughfares, installation of sewer lines, and other improvements for the benefit of both Plaintiff and Defendant FirstSouth. Such improvements were made

with the consent of FirstSouth. In accordance with such agreement, as shown above, FirstSouth renewed the note on two different occasions to extend the maturity date to August, 1986. However, in August, 1986 Defendant FirstSouth refused to renew the notes as it had represented it would, and has now demanded payment of the notes and has threatened to foreclose on the real property.

COUNT I.

USURY

11. Plaintiff alleges and incorporates herein by reference paragraphs 1 through 10 above.

12. With respect to the Rasor tract, Defendant FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, by reason of the "commitment" fees, "origination" fees, other fees and "profit" received which are in reality compensation for the use of money. Accordingly, Plaintiff is entitled to recover from Defendant FirstSouth three times the amount of usurious interest contracted for, charged or received by Defendant FirstSouth and return of all principal paid to FirstSouth and twice the amount of all interest charged or received, and its reasonable and necessary attorney fees as well as costs of suit, all of which exceed the minimum jurisdictional requirements of this Court. Alternatively, Plaintiff is entitled to recover three times the amount of usurious interest charged or received and its reasonable and necessary attorney fees.

13. Respecting the Frankford property, FirstSouth has contracted for, charged or received interest in excess of twice the amount allowed by law, or alternatively, in excess of the amount allowed by law, in contracting for a "profit

participation," and in charging fees which are not reasonably related to the value of any services performed by Defendant. Accordingly, Plaintiff is entitled to the statutory penalties and recoveries at common law as outlined in paragraph 12 above.

COUNT II.

BREACH OF FIDUCIARY DUTY AND BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

14. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 10 above.

15. Alternatively, Plaintiff seeks a declaration that Defendant FirstSouth was in reality a partner with Coit Independence Joint Venture by reason of its profit sharing interest in the joint venture and by reason of the understanding of the parties that FirstSouth would act as the "financial partner" in the enterprise and the other co-venturers would act as the "service partners" to develop and market the property for resale at a profit to benefit all the venturers. As a partner, FirstSouth owes Plaintiff a fiduciary duty to deal with its partners in a manner that will not destroy or impair partnership assets. FirstSouth's failure to provide the agreed upon capital and operating contributions for the properties and to deal with its partners in a fair manner constitutes a breach of its fiduciary duty to Plaintiff and its implied duty of good faith and fair dealing.

16. As a direct and proximate result of the wrongful conduct of FirstSouth, Plaintiff has been damaged in an amount that exceeds the jurisdictional minimum of this Court.

WHEREFORE, Plaintiff respectfully requests that Defendant FirstSouth be cited to appear and answer and upon final hearing Plaintiff have judgment against FirstSouth in the amounts prayed for above, or alternatively, that Plaintiff have

declaratory judgment, that the relationship between it and Defendant FirstSouth was that of partner or joint venturer and further declaration that any alleged note, deed of trust, guaranty or other document is unenforceable as a loan or guaranty against Plaintiff. Plaintiff further prays for its pre-judgment and post-judgment interest as allowed by law, for damages on its usury claim according to the statute, its reasonable attorney fees, costs and such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

s/PAUL E. GALVIN
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Attorneys for Plaintiff

VERIFICATION

THE STATE OF TEXAS }
COUNTY OF DALLAS } ss:

BEFORE ME, the undersigned authority, on this day personally appeared Charles C. Taylor, who being first duly sworn, upon his oath stated he is a Managing Joint Venturer of Coit Independent Joint Venture, that he has authority to execute this Verification, that he has knowledge of the facts set forth in paragraphs 1-13 of Plaintiff's Original Petition, and that the facts stated therein are true and correct.

s/CHARLES C. TAYLOR

SUBSCRIBED AND SWORN TO BEFORE ME this *24th* day of October, 1986.

s/SANDRA L. HOWERTON
Notary Public in and
for the State of Texas

Sandra L. Howerton

My commission expires:

August 29, 1989

ANDREWS & KURTH

Coit/Independence Project

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October 9, 1987

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Return Receipt Requested

Coit Independence Joint Venture
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Attention: David L. Gray

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Return Receipt Requested

Mr. A. Starke Taylor, Jr.
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16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Certified Mail No.
P-498 070 247
Return Receipt Requested

Mr. David L. Gray
Coit Independence Joint Venture
16800 Dallas Parkway,
Suite 210
Dallas, Texas 75248

Re: Notice of Acceleration and Foreclosure

Dear Sir:

Please be advised that because of the unpaid indebtedness referenced in the attached Notice of Sale by Substitute Trustee by which Joseph M. Osborne, Substitute Trustee acting at the direction and request of the Federal Savings And Loan Insurance Corporation, as Receiver for FirstSouth, F.A. (the "Receiver") gives notice of sale at foreclosure of the property therein described, and because of the currently existing default in regard thereto, all of said indebtedness has been and hereby is accelerated. In addition, foreclosure of all property described therein will be made in accordance with the terms of said notice unless payment in full of the described indebtedness is made prior to the foreclosure date. Please note that said foreclosure will occur on the first Tuesday of the next month, same being November 3, 1987 between the hours of 10:00 a.m. and 4:00 p.m. at the steps of the Collin County Courthouse in McKinney, Texas.

Enclosed are the Federal Home Loan Bank Board's Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver. Any questions regarding the Bank Boards procedures should be directed to the Federal Home Loan Bank Board, Adjudication Division, 1700 G. Street, N.W. Washington, D.C. 20552; (202) 377-7399.

Very truly yours,

/s/ JOSEPH M. OSBORNE
Joseph M. Osborne

Enclosures

cc: Donna R. Harrigan
Special Representative for FSLIC
as Receiver for FirstSouth, F.A.
1600 FirstSouth Building
Little Rock, AR 72201

James P. Cooke, Esq.
Hopkins & Sutter
545 East John Carpenter Freeway
Irving, TX 75062

Steven D. Chantelois,
Federal Asset Disposition Association
5080 Spectrum Drive
Suite 1100 E
Dallas, TX 75248

Home Federal Savings and Loan
100 South Main
Mountain Home, AR 72653

Attention: Eddie King

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

12 U.S.C. § 1464(d)(6)(C) of the Home Owners Loan Act of 1933 provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank] Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. § 1728(c) of the National Housing Act provides:

> No action against the [Federal Savings and Loan Insurance] Corporation to enforce a claim for payment of insurance upon an insured account of an insured institution in default shall be brought after the expiration of three years from the date of default unless, within such three-year period, the conservator, receiver, or other legal custodian of the insured institution shall have recognized such insured account as a valid claim against the insured institution and the claim for payment of insurance shall have been presented to the Corporation and its validity denied, in which event the action may be brought within two years from the date of such denial.

12 U.S.C. § 1729(c) and (d) of the National Housing Act provide:

> Powers of Corporation and Federal Home Loan Bank Board on Default of other institutions
>
> (c)(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the court or other public authority having the power of

> appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.
>
> (2) In the event of the Federal Home Loan Bank Board determines —
>
> (A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed receiver of an insured institution pursuant to paragraph (2) —

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to the Corporation had been appointed receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) this section shall mean the Board.

Additional Powers of Corporation

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

12 U.S.C. § 1730(k)(1) of the National Housing Act provides:

Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court of the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before

final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Section 549.4 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. Mailing notice of the disallowance to the claimant's last address appearing on the association's books or on the proof of claim shall be sufficient notice. Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the Board may otherwise determine.

Section 569a.8 of the Federal Home Loan Bank Board Regulations provides, in relevant part:

(b) any claim filed on or before the date fixed pursuant to paragraph (a) of this section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefor shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.